No. 76-657

JUN 19 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE NEWSPAPER GUILD, PETITIONER

v.

EDWARD H. LEVI, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

DONALD I. BAKER,
Assistant Attorney General,

BARRY GROSSMAN,
ANDREA LIMMER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-657

THE NEWSPAPER GUILD, PETITIONER

v.

EDWARD H. LEVI, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, pp. 21b-46b) is reported at 539 F. 2d 755. The opinion of the district court (Pet. App. A, pp. 1a-20a) is reported at 381 F. Supp. 48.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on August 19, 1976. The petition for a writ of certiorari was filed on November 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 C.F.R. 48.1, which provides that not all joint newspaper operating arrangements require the prior written consent of the Attorney General but that such arrangements that are put into effect without such consent remain fully subject to the antitrust laws, is consistent with Section 4(b) of the Newspaper Preservation Act.

STATUTE AND REGULATION INVOLVED

The Newspaper Preservation Act, 84 Stat. 466, 15 U.S.C. 1801 *et seq.*, is set forth at Pet. App. C, pp. 47c-51c. The challenged federal regulation, 28 C.F.R. 48.1, is set forth at Pet. 3-4.

STATEMENT

The Newspaper Preservation Act, 84 Stat. 466, 15 U.S.C. 1801 *et seq.*, was enacted in response to *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, in which a joint operating arrangement between competing newspapers was held to be a *per se* violation of Section 1 of the Sherman Act. The Act granted an exemption from the antitrust laws to the 22 joint newspaper operating arrangements then in existence (Section 4(a) of the Act, 15 U.S.C. 1803(a)), and permitted reinstitution of the joint arrangement that had been invalidated in *Citizen Publishing Co.* (Section 5 of the Act, 15 U.S.C. 1804). See H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 3 (1970); 116 Cong. Rec. 24434 (1970).

Congress also provided in Section 4(b) of the Act, 15 U.S.C. 1803(b), that "[i]t shall be unlawful for any person to enter into * * * a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States." The Attorney General may consent if he determines "that not more than one of the newspaper[s] * * * involved in the arrangement

is * * * other than a failing newspaper, and that approval * * * would effectuate the policy and purposes of this chapter." *Ibid.* Upon the approval of the Attorney General, the joint operating arrangement is exempt from the antitrust laws.

On January 2, 1974, the Attorney General promulgated a regulation (28 C.F.R. 48.1; Pet. 3-4) stating that the Newspaper Preservation Act does not require that all joint newspaper operating arrangements be submitted for prior approval, but rather, that such approval is necessary only if the parties seek the antitrust exemption that the Act provides. The regulation also states that joint newspaper operating arrangements put into effect without the Attorney General's approval would be "fully subject to the antitrust laws." *Ibid.*

Petitioner sued in the United States District Court for the District of Columbia to have the regulation declared invalid and to enjoin its implementation. The district court granted summary judgment for petitioner, on the ground that a literal reading of Section 4(b) required that all joint newspaper operating arrangements be submitted for the approval of the Attorney General (Pet. App. A, pp. 1a-20a).

A divided court of appeals reversed (Pet. App. B, pp. 21b-46b). The court acknowledged that "[a] rigidly literal reading" of Section 4(b) in isolation from the rest of the statute and its legislative history would support the district court's conclusion (Pet. App. B, p. 26b). But the court looked beyond the isolated language of Section 4(b) "to the provisions of the whole law, and to its object and policy" (Pet. App. B, p. 26b, quoting *Richards* v. *United States*, 369 U.S. 1, 11). After a careful examination of these factors, the court of appeals concluded that Section 4(b) is properly construed, not as requiring as a condition of legality that all joint newspaper arrangements obtain prior approval, but as creating an exemption from the antitrust laws for those joint operating arrangements that do obtain such approval. The

court held that the legislative history shows that in enacting Section 4(b) Congress did not intend to make illegal all otherwise valid joint operating arrangements that did not obtain the Attorney General's approval (Pet. App. B, pp. 26b-32b).

ARGUMENT

The decision of the court of appeals is correct and raises no issue warranting review by this Court.

Petitioner agrees that the court of appeals properly considered legislative history in interpreting the statute (Pet. 22).[1] It contends that the legislative history is not clearly inconsistent with a literal interpretation of the statute, that the literal interpretation therefore must be accepted, and thus that the regulation is invalid. Petitioner's view of the legislative history, however, is incorrect.

As construed by the district court, Section 4(b) would create a new offense. Under the Act, the Attorney General may approve joint newspaper operating arrangements only if he determines that not more than one of the newspapers is not failing. With the Attorney General's authority thus limited, the district court's construction of Section 4(b) would render illegal any joint operating arrangement between two or more financially healthy newspapers, without regard to whether such a joint venture would violate the antitrust laws or any other public policy.

The court of appeals correctly concluded that this was not the intent of Congress. The legislative history

[1]As the court of appeals noted, Congress' failure to enact any procedural or penalty provisions to enforce what under the district court's view would be a new substantive offense, though not conclusive, does provide reason to doubt whether Congress actually intended such a result. In this circumstance, the court of appeals' scrutiny of legislative history was appropriate and necessary.

shows that the Act was adopted to create an antitrust exemption for certain joint newspaper arrangements, in response to the decision in *Citizen Publishing Co.* v. *United States, supra,* and not for the converse purpose of prohibiting previously lawful newspaper joint ventures (see Pet. App. B, pp. 26b-29b). Petitioner quotes language of both Senator Dirksen and Assistant Attorney General McLaren to support its contention that Section 4(b) reflected a congressional compromise by which previously legal conduct would be made illegal in exchange for the exemption for previously illegal conduct (Pet. 5-7). However, the quoted language does not support petitioner's view of congressional intent, for the bill Senator Dirksen and Assistant Attorney General McLaren were discussing explicitly provided that the Act would not make illegal any conduct which was then legal under the antitrust laws (Pet. App. B, p. 28b).[2] See also H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 11 (1970).

Moreover, petitioner's construction of Section 4(b) would have anomalous results. Congress was concerned about the precarious financial health of the newspaper industry and for that reason provided an antitrust exemption for financially-troubled papers (Pet. App. B, p. 23b). Yet petitioner would read the statute so as to deny to solvent papers the right to enter cost-saving joint ventures that do not violate existing antitrust law. Solvent papers would thus be denied a major means of avoiding the financial losses that were of such concern to Congress.

As the court of appeals pointed out (Pet. App. B, pp. 29b-30b), had Congress intended such a major change in the

[2]The proviso was deleted from the final version of the bill, but as the court of appeals pointed out (Pet. App. B, p. 29b), nothing in the legislative history suggests that Congress considered the deletion to have substantive significance.

law as a *quid pro quo* for the antitrust exemption, one would expect to find some specific discussion of this decision and of the policy reasons for imposing upon newspaper joint ventures stricter standards than are applicable to other industries. There is no such discussion in the legislative history, and the court of appeals was correct in ascribing significance to this silence. *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1.

For the foregoing reasons, the court of appeals properly rejected the district court's interpretation of Section 4(b) and held the federal regulation to be reasonable and consistent with the Act. Cf. *Udall* v. *Tallman*, 380 U.S. 1, 16; *Zemel* v. *Rusk*, 381 U.S. 1, 11; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Knebel* v. *Hein*, No. 75-1261, decided January 11, 1977, slip op. 5-6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DONALD I. BAKER,
Assistant Attorney General.

BARRY GROSSMAN,
ANDREA LIMMER,
Attorneys.

JANUARY 1977.

DOJ-1977-01